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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1277

RACHEL J. MEYER,
Respondent,

vs.

MISSOURI STATE HIGHWAY COMMISSION,
Petitioner.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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AUTHORIZATION FOR SUPPLEMENTAL BRIEF

Supreme Court Rule 24(5) provides:

> "Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of his last filing."

In accordance with this rule, petitioner respectfully submits the following supplemental brief to its petition for writ of certiorari filed on March 13, 1978.

ADDITIONAL REASONS FOR GRANTING WRIT

The decision below conflicts with controlling opinions of this court and the Second Circuit Court of Appeals as presented in Townsend v. Nassau County Medical Center, 558 F. 2d 117 (2nd Cir. 1977), cert. denied (No. 77-718).

This court has recently had the opportunity to review a decision by the Second Circuit reversing a district court holding of discrimination based upon statistical evidence and chose not to grant certiorari to review the decision of the Second Circuit. The decision of the Second Circuit is *Townsend* v. *Nassau County Medical Center*, 558 F. 2d 117 (2nd Cir. 1977). The facts of that case are analogous to the case below from which this petitioner seeks review. In the *Townsend* case a black female employee instituted action against her employer, alleging racial discrimination. The plaintiff had been employed as a laboratory technician when the employer, a county, changed the job classifications and adopted new prerequisites for employment. The county required that individuals in the job position of plaintiff pass an examination which could only be taken by people with a college degree in science. Although plaintiff did not have a degree, she was allowed to take the examination under a "grandfather clause." She did not pass the examination, her employment was terminated, and she was rehired in a lower paying position. Thereafter, the employee brought suit for back pay, alleging that the college degree requirement was a violation of Title VII of the Civil Rights Act because that requirement had a disproportional racial impact insofar as far fewer blacks had college degrees than whites in the general population. The district court found that the plaintiff made a prima facie case by the statistical evidence of disparity in education between whites and blacks in the general population, and that there was no evidence which indicated a college degree was necessary for the position from which plaintiff had been dismissed. *Townsend*, supra, at 117-119.

The court of appeals reversed the district court by concluding that the plaintiff had not established a prima facie case based upon statistics of the general population. No evidence was presented of intentional discrimination by the defendant county or defendant medical center, and the court stated "(t)hat statistical evidence concerning only the general population is (not) sufficient to demonstrate that a job prerequisite 'operates to exclude' minorities." What must be shown is that virtually no member of the minority could qualify for the position because of the job prerequisites. *Townsend*, supra at 120. The appellate court reversed the district court and directed that the complaint be dismissed. *Townsend*, supra at 122. This court refused to grant plaintiff's petition for writ of certiorari. (Slip Decision No. 77-718)

The facts in the *Townsend* case are strikingly similar to the facts in the instant case. The opinion below is based upon the statistical evidence presented which compared the number of men hired for the position of maintenanceman to the entire population. This was the evidence as explained in the petition for writ of certiorari previously filed upon which the appellate court reversed the district court's findings of fact. There was no evidence that the State Highway Commission intentionally discriminated against the plaintiff-respondent. The decision below is directly contrary to the decision in the *Townsend* case, supra, a Second Circuit case; therefore, a conflict exists between the Eighth Circuit and the Second Circuit and petitioner respectfully requests that this court grant the

petition for a writ of certiorari in order to resolve this conflict.

Within the Second Circuit decision in *Townsend*, supra, a reference is made to a decision of this court. In *Washington* v. *Davis*, 426 U.S. 229 (1976), this court reversed the Appeals Court for the District of Columbia, which had, in turn, reversed the district court that had tried the case. The district court case involved the question of whether an employment test was illegally discriminatory. The trial court determined that although the test resulted in more blacks failing than whites, it was not illegally discriminatory because it was reasonably and directly related to job requirements. The appellate court reversed the district court on the basis that intent of the defendant was irrelevant, and that the discriminatory impact was controlling. The Supreme Court reversed the appellate court and reinstated the trial court's finding. *Washington*, supra at 603-614. Petitioner respectfully suggests that this court in the instant case should likewise reverse the opinion of the court below and reinstate the district court's findings, in order that the final decision in this case be consistent with the decision in *Washington* v. *Davis*, supra.

Respectfully submitted,

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